BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

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| IN THE MATTER OF: [redacted] | ) | |
| | ) | NO.: 00-45 |
| | ) | DUE PROCESS HEARING |

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**FINAL ORDER**

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Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
December 21, 2000

## FINAL ORDER

This proceeding involves the validity and appropriateness of the transfer of a county special education student to the city school system by the "transition agreement" between the county and city boards of education following annexation by the city of an area including several of the county schools but not the residential area of the student. This student, age 15 at the time of the hearing, was one of five county students with multiple disabilities transferred by this agreement. Due process hearings were held on the same date for two of these students and parents of both students testified at each hearing. This student's IEP provides for total specialized curriculum, special equipment, special transportation, and no regular educational program.

## ISSUES

The three issues identified prior to the hearing were as follows:

1. Did the county school system have authority to transfer the student to the city school system?

2. Did the transfer violate the student's/parent's procedural rights?

3. Is the current educational placement appropriate for the student?

## THE DUE PROCESS HEARING

Several witnesses and exhibits were presented at the due process hearing and all have been considered. A summary of portions of the evidence provides the factual basis for this final order. The student's mother testified her residence in the county had been intentionally selected as outside of the proposed area to be annexed when she had moved to the county so her child could attend the county school system approximately 7 years earlier. At the April 4, 2000 IEP Team meeting in the county middle school the school system members advised that her daughter had to be moved to a high school the next year. The school system members looked up the placement and stated it would be Kirby High School. The parent responded Kirby was a city school and her daughter would not be going there. The mother testified the members of the IEP team said she did not have to worry about Kirby because it did not "have a program anyway." The parent asked why her daughter could not remain at the middle school another year and was told she would need to talk to the Director of Special Education for the county school system.

On May 22 the Director of Special Education told the mother she could not make a decision about the student remaining at the middle school the next year. The director told her the daughter had to graduate the eighth grade but there was a possibility she could go to a county school rather than Kirby and to call her back sometime in the summer. The mother started trying to call the director back on July 31. The mother called and left messages on

August 1 and on that day received a letter from the county school transportation department advising the parent of the bus number the student would be riding beginning on August 14 at 6:25 a.m. The mother continued to call for the director daily and left messages which were not returned until August 7.

On August 7 the director advised the mother she had been at the city school system talking about the student's placement and the student would be placed at the Shrine School which she knew the mother would not be pleased with. They discussed the proposed placement and the mother was told a city school person would contact her in two days. Two days passed and because the mother had not been contacted she phoned the person in the city school system, identified herself, and asked about the student's placement, etc. The city school person advised the mother two days earlier he had received six files, the files had not been reviewed, and there was no placement. He said he hoped it would be done soon because there were less than two weeks from the start of the city school year and five days from the county school year beginnings.

On August 14 the mother was called by the city school representative and informed the student had been placed at Kirby High School. The mother replied the student was not going to attend that school and asked for a meeting which was denied. A letter postmarked August 15 was received by the parent August 17 from the city school system identifying the placement for school beginning on August 21. The letter was postmarked on the 15th and stated the parent and student should be at the school for

registration on the 15th. The letter stated transportation would be provided; however, on the first day of school no transportation arrived at the residence. A week later a city school bus arrived at the residence and advised the parent the student would be taken to another named school.

Exhibit No. 3, the letter from the city schools, states it has attached to it a copy of procedures regarding placement evaluation and procedural safeguards; however, nothing was attached to the letter when it was received. The mother's greatest concerns about her student attending the city school rather than a county school relate to safety and her information and experience that the county system provides a much better educational experience.

The father of the student in the Due Process Hearing supported the mother's testimony and testified if he had known in April, May, June, or July his child was going to be transferred to the city school system he would have put his house up for sale and moved to another area in the county or would have asked his company to transfer him to another part of the State. Since he had learned about his daughter being transferred he had been looking for another house.

Another set of similarly situated parents also testified. The mother was a county resident with a 14-year-old special education student who had been in a county school but then was placed in the city school. At the regular IEP meeting in the spring she was told that because of her age the student would be going to a different school. The parent testified she had not been told what school and

had never received any written notification from the county system that the student had been transferred to the city schools. She had received a letter from the county transportation department indicating they would be picking up the student and on the first day of classes the bus arrived at the residence. However, the parents elected to take the student to school rather than allow her to ride the bus and took her to the county school only to be informed the student was not in the county system anymore. They were told she was now a city school student and the parents should be talking to the city school personnel because the city school would be starting in seven days. This second student has severe seizures and is on different kinds of medications she takes three times a day. She is subject to seizures at any time and is also developmentally delayed. Previous years she had attended school with the student involved in this Due Process Hearing and they had ridden a bus together with an attendant and a bus driver.

On the first day of county school, August 14, this mother called the city school system and was advised they did not know where her student would be placed but would contact her later. That afternoon she received a call from the city school system advising her a teacher had been found and she needed to register her student the next day at Kirby High. When she went to register her student the next day she learned they had no records or any information on her student. She then received a letter from the city school system on or about the 17th stating her daughter had been assigned to Kirby and she should register her on the 15th.

This mother did not want her student attending a city school because she thought the county school system was a better system and she had been very pleased with the county school system over the six or seven years her daughter had been attending it.

The father of this second child testified to essentially the same set of facts. He happened to be home on the first day of county school when the school bus arrived and he and the mother took the student to the same county middle school she attended the year before only to be told that she had been transferred to a city school but they did not know which one.

The first witness called by the school was the Director of Special Education for the county school system. She was first asked about the transition agreement entered into by the city and county after the city annexed an area of the county. The annexed area did not coincide with school district zone lines. The agreement was that "students would remain frozen in their districted areas" for one school year and then everyone would attend the schools for the county if they lived in the county or the city if they lived in the city. This agreement applied system wide and all students, whether regular or special education, without exception, attended the school they were previously districted for.

The special education office for the county system did not send out any individual notices that the special education students would be attending another school system. The county Director of Special Education had spoken with the city school special education

person in May and then again on July 29 when she took the files to the city school system. The city school system started on the 21st of August and the county school system started on the 14th of August. It was her information there were some 900 students that resided in the city and were attending the county schools this year under the agreement and only some 200 to 400 county residents attending city schools under this agreement.

The agreement was introduced as an exhibit. The city annexed a portion of the county including several county schools effective December 31, 1998. The city was to receive title to the schools July 1, 1999 and own, staff and have jurisdiction over the annexed schools. However, the attendance zone lines previously established by the county would remain frozen through the 2000-2001 school year and annexed city students would continue to attend zoned county schools and nonannexed county students would attend zoned (annexed) city schools. It provides further that "both school districts will also begin planning to determine assignments after the 2000-2001 school year for students residing in geographic areas, currently assigned to Kirby High School, that were not part of" the annexed area.

The Director of Special Education said under the agreement this student "was to be dropped to the city school." She testified since Kirby had become a city high school she did not know what was going on at the school. She testified when it was a county school it did not have a program appropriate for this student. She also testified that even if it did not have one

earlier it did not mean that it would not have an appropriate program during this school year although she did not know as of the date of the hearing what program, if any, was there. It was her testimony that the city school had the responsibility to implement the IEP which had been transferred to the city system from the county system. She testified the county high school closest to this student did have an appropriate program for children with this level of disability and she had no knowledge and could not make a judgment as to what was available at the city school where this student was to go. The attorney for the student established the county high school classroom for the special education students was crowded and asked why the next child who came into the area was placed in that crowded situation rather than into a city school special education class. The answer was the student did not live within the area governed by the agreement between the city and county.

The next witness was a special education teacher assigned to the middle school the student attended the previous year. She participated in the IEP Team planning for this student. The testimony first involved the IEP for school year 1999-2000. At that time the student was zoned to Kirby High School but it was agreed she would stay at the middle school in 1999-2000, an extra year. The witness testified city school versus county school was a big issue in both the 1999 and 2000 IEP Team meetings. At the 2000 IEP Team meeting for the school year 2000-2001 the parent was concerned and said she wanted her child to remain in the county

school system. The IEP Team told the parent she would have to contact the Director of Special Education if she had any problems and the witness did not remember much more than that when asked if they were told about their rights to appeal.

On cross-examination the teacher testified that the student had been with her over 2 years and had done "great". The witness testified that at the IEP meeting in 2000 they discussed that the student would be going to Kirby and the mother was displeased. Upon questioning by the Court it was clear the IEP Team never considered any option other than Kirby High School. It was learned that Kirby High School was then a city school although there was no representative from that high school or the city school system at the IEP Team meeting and, apparently, it was unknown as to what was available at the high school for this student.

The next witness was a special ed curriculum coordinator serving some five county elementary and middle schools. She also attended the April, 2000 IEP Team meeting for this student. She testified the mother was not pleased with her student going into the city school system and when asked why the IEP did not have a specific reference to the high school she testified as follows:

> "If it had been a high school within the county system that I was working with, then we would have been more specific in the meetings and I would have gone much further in the minutes because we would have planned an on-site visit and a smooth transition.
>
> The way it was in this situation, I'm not familiar enough with the [city] school system to know 100 percent sure that the services that we were saying [student] needed would be

> offered at Kirby High School so we had to leave it to the general specifications of contacting the [city] schools. Does that make sense?"

The witness testified the school the student attended was not a placement. This witness also gave the parent the Director of Special Education's name and number to contact about her concerns because the witness/IEP Team could not address them.

On cross-examination, when asked if Kirby High School had an appropriate class for this student to enter in the fall of 2000, the witness testified she was not familiar with the city schools. The witness explained if the middle school student was moving to a high school in the county system they would usually have someone from that high school as a part of the IEP Team meeting so they could get to know the child and meet with the family prior to the transfer to the high school and in this, and other ways, have a smooth transition going into the new learning environment. She testified the mother was not comfortable with the city schools and the IEP Team did not have any information to provide her about the school or program that would be offered in the city. The city had not been invited to the IEP Team meeting.

The witness testified the county school had appropriate facilities for this student and could meet the needs identified in the IEP. The witness testified the IEP Team had nothing to do with where services would be provided the student and the IEP Team only decided the most appropriate services for the child. That would be a reason why there was no notice about any change in placement

or any information given in a formal notification about where the student would be attending school because that was not a decision made by an IEP Team.

On re-direct the witness testified that she had been a special education teacher in the city school system for approximately eleven years and was permitted to testify that she believed the city school system could provide the services necessary for this student, although she had no idea what it had been like in the city school system since she left five years before.

Throughout the hearing, representatives of the county school system repeatedly expressed their position they had no responsibility for the student after the transition agreement placed the county student in the city system. They knew the county had the appropriate facilities and could deliver the services specified in the IEP for this student. Although they may have believed the city could provide the services, they did not know and did not believe it was of any concern to them.

## DISCUSSION

**Did the county school system have authority to transfer the student to the city school system?**

The parent addresses the issue by specifying the student is a resident of the county that has been transferred to the city school system. The authorities addressed by the student include Public Law 94-142 (IDEA), Public Law 93-112 (The Rehabilitation Act of 1973), Public Law 101-335 (The Americans With Disabilities Act)

and other statutes and regulations specifically concerning a change of educational placement. The school system's position is that none of the Federal authorities address the circumstances presented in the instant case and State statutory provisions, T.C.A. §49-6-3104(a) and T.C.A. §7-51-908 clearly provide authority for one local education authority to make arrangements with another local educational authority for the education of a student.

Title 49 of Tennessee Code Annotated is entitled "Education". Chapter 6 is concerned with elementary and secondary education and Part 31 is "Census And Assignment Of Students Generally". T.C.A. §49-6-3104 comes under these headings. Chapter 10 of Title 49 is "Special Education" and would be more applicable in this proceeding. Without deciding the authority of the county to contract with the city schools to provide special education under the statutory provisions addressed in the briefs, it would appear provisions of Chapter 10, specifically including §49-10-107 and §49-10-305 do grant one school district authority to contract with another school district to provide special education services.[1]

Based upon these statutory provisions alone, a county school

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[1] § 49-10-107 provides that "Nothing in parts 1-6 of this chapter shall be construed to prevent a school district from providing educational, corrective or supporting services for children with disabilities by contracting with another school district to provide such services for children with disabilities from such other district."

§49-10-305 provide, in part, that "school district may enter into agreements with other districts or states to provide such special education; provided, that a child receiving special education outside the school district in which the child would normally attend public school shall continue to be the responsibility of such school district . . ."

district would have authority to contract with a school district to provide special education services to a county student. The question becomes whether the transfer in this case would fall within the authority granted by statute. Nothing presented to the undersigned Administrative Law Judge would prohibit one school district from contracting with another to provide educational services under the terms of a "transfer" as presented in this case and, therefore, it would appear that the county would have legal authority to enter into such a contract.

The validity of the specific written agreement is called into question by the parents because the agreement does not contain the provision required by T.C.A. §49-10-306 that the child and parent "shall continue to have all civil and other rights that the child would have if receiving like education or related services within the subdivision or school district where the child would normally attend public school." The statutory provision provides that no such contract is valid unless it contains this provision, However, there is no question but that the student, if the student had no disability, would be attending the same school, the city school, even though a resident of the county and, therefore, would be attending this same school in question if attending "where the child would normally attend public school."

**Did the transfer violate the student's/parents' procedural rights?**

The parents assert they were not provided the required procedural safeguards they were entitled to in the change of placement for their student. The school takes the position that assignment of the student to the city high school pursuant to the agreement between the city and county school is not a change in placement so as to trigger any procedural requirements or notice under Federal law.

It is logical to think of placement as the location where the student is assigned to receive educational services. This may well be a placement. However, it appears from the authorities that a change in placement "does not occur when a student is transferred from one school to another with a comparable program." Morgan v. Chris L., No. 94-6561 (6th Cir. January 21, 1997), 1997 U.S. App. LEXIS 1041, citing Tilton v. Jefferson County Board of Education, 705 F.2d 800 (6th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). See, e.g. Morris by Morris v. Metropolitan Government of Nashville, 26 IDELR 159 (U.S.D.Ct.M.D.TN No, 3:96-1112, June 24, 1997). There may remain some question as to whether the program was comparable in the city school facility, whether a change from the home school district to another school system constitutes a change in placement, and whether the parents were permitted to participate in the IEP Team process as intended; however, under the proof presented no change in placement triggering the procedural requirements occurred.

**Is the current educational placement appropriate for the student?**

The assertion of the parents addressing this question is essentially that it is not appropriate to take a resident county student out of a good program and place her in an inferior program in the city school system. The county school system's position is that the parents must address any questions regarding the provision of educational services for their student to the city school system which is not a party to this proceeding. As noted before, the county takes the position that signing the transition agreement completely removed the student from their responsibility. A concern expressed by the undersigned at the hearing was that the county school system was telling a resident county student they were gone from the county system and, although the county might take them back in a year, the county did not care what happened to them between now and then. The student had not been in school and it was not known or established at the hearing what, if any, services were being offered this student.

Although the appropriateness of the IEP contents was not challenged in these proceedings, the appropriateness of where, when and if they could or would be delivered was challenged. The events between the April IEP Team meeting and the start of school in the county and then the city, apparently followed by no, or improper, transportation, refusal of the city to a requested meeting, and the student not attending school, when presented with the county school system's response that it is not their problem establishes that the

development and implementation of the IEP is not appropriate.

The county school system remains responsible for the provision of special education and related services to this student. Generally speaking, the student's resident school district is responsible for identifying eligible students and providing FAPE. The authorities in T.C.A. §49-10-305(a), 34 C.F.R. 104.31-39 (104.33(a), (b)(3), and 104.34 in particular) and 34 C.F.R. 300.340-350 (300.341 in particular) confirm this principle and lead to the conclusion that the county remains responsible for this student. The county has not fulfilled this responsibility according to the evidence presented. From the time of the IEP Team meeting in the spring of 2000, and maybe even before that, the county school system determined this student was not their responsibility. When the IEP was developed for the student, the members developed a general IEP and did not know where, who, or how it might be implemented. It was expressly not written as it would have been if the student had remained in a county school and the normal transition was not provided or attempted for a student moving from middle school to high school. The members of the IEP Team in the spring of 2000 and those who testified at the Due Process Hearing in the fall of 2000 knew virtually nothing about any educational program for the student and had made no efforts to learn about any educational program for the student. The position of the county school system was that it had no responsibility to the student or parents for the education of the student.

This is a student whose parents moved to the county from the city so that the student could be educated in the county school system and by the county school system. This was a student who reportedly would be educated in the city school system, and by the city school system, for the one year as a result of the annexation agreement between the city and the county and then the student would be returning to the county school system, to be educated by the county school system, presumably for the remainder of her years of special education. Although this agreement had the effect of transferring numerous county residents/students to city schools for educational services and, also, transferring even more city residents/students to the county schools for educational services, the only student's educational services addressed is the one whose parents initiated this Due Process Hearing.

**FINDINGS AND CONCLUSIONS**

1. This student is eligible for special education and related services under IDEA and Tennessee statutory provisions.

2. The county did have authority to transfer a special education student to the city school system for special education and/or related services.

3. The transfer did not violate the student's/parents' procedural rights because it was not intended to be a change in services provided and, although it was transferring the student from the county school system to the city school system, it was intended to provide educational services in the same school where

the student would receive educational services if the student had no disabilities.

4. The student has not been discriminated against by the county because of any disability in the transfer of the student to the city school system.

5. The student and parents are residents of the county and not of the city.

6. The location and provision of IEP services was not determined upon consideration of the individual needs of the student.

7. The county school system remains responsible for providing this special education student with a free appropriate public education (FAPE).

8. The county school system has failed to provide this student with FAPE. The county did not know what, where or who would provide services for this student when the IEP was prepared. The IEP has not been implemented and no services have been provided. The student has not attended school and the county has taken the position that the transition agreement "dropped" the student to the city school system, absolved the county from any responsibility to the student or her parents, and the parents and student must seek satisfaction from the city.

## RELIEF

The county school system must provide this student with FAPE. The specific provisions of the IEP developed April 2000 have not been challenged and may currently be appropriate. If not, a new IEP must be developed. It is the responsibility of the county to ensure that the educational and related services are provided in an appropriate setting and this would include necessary transportation. This is not to say that FAPE cannot be provided through a contract with the city school system; however, the obligation remains with the county to see that this student is provided FAPE.

Because this student has missed most, if not all, of a semester of school, equitable relief should include one semester of compensatory schooling or an extended school year this summer.

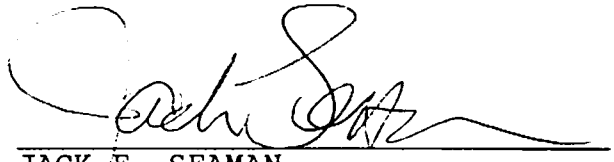
## ORDER

It is, hereby, ORDERED as follows:

1. Within the first two weeks of school beginning the new calendar year (2001), the county school system shall develop a complete IEP specifying the services to be provided, the provider or providers of the services if known, the frequency and location where the services will be provided, and shall take all appropriate action to ensure the services are available for and provided to this student.

2. The student is granted one semester or an extended school year this summer, as determined more appropriately by the IEP Team developing the IEP for the 2001-2002 school year.

Entered this 21st day of December, 2000.



JACK E. SEAMAN
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. #4058

## NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

## CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing document has been sent via facsimile and by mail, with sufficient postage prepaid, to the following on this 21st day of December, 2000:

James Cook, Esq.
Counsel for Parents
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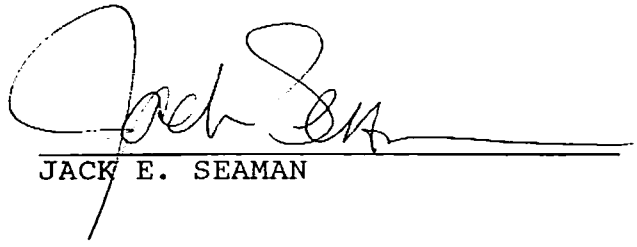

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